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The ADR Newsletter

Alternative Dispute Resolution Section of the State Bar of Michigan

Mediation Comes in More Than One Size

— by Jon R. Muth

One size does not fit all. We know this when it comes to screwdrivers, knives, brushes, and luggage, so we all keep several sizes on hand, to use according to the needs of the situation. But do we know this when it comes to mediation? The State Court Administrative Office (SCAO) has endorsed a mediation model that emphasizes joint sessions, as if that mediation model fits every situation. In its court-rule mediation training standards published in January 2001, SCAO indicated it would approve only mediation training models that keep all parties together as much as possible:

> The training model should clearly reflect that parties are kept together during mediation except for... limited purposes... [T]raining in a process whereby parties are automatically or routinely separated early in the mediation session...in a shuttle-diplomacy manner is specifically disapproved.[1]

While I do not contend that keeping parties together is always a bad idea, it is a serious mistake to assume it is always a good idea. Getting the parties together most of the time works in some cases, and getting them together some of the time works in most cases. But the joint session does not work as the exclusive or primary technique in all cases, and does not work well as a general approach in the commercial cases I typically mediate. Mediators trained only in the SCAO model may not fully appreciate the choices they have or the respective merits of those choices.

I don't possess the professional skills of a marriage counselor, psychologist, or séance director. I am a trial lawyer. I can bring to a case the benefit of 32 years in the law, good training as a lawyer and as a mediator, knowledge of legal processes, familiarity with issues and the way courts analyze them, understanding of the vicissitudes of trials and predilections of judges, the ability to listen hard and prod deliberately, appreciation of the emotional and opportunity cost of litigation, realization that interests and results can often diverge, and a fairly well-developed sense of what is truth and what is pretense. Even though, under Michigan's mediator court rules, the mediator need not be a lawyer, I think my legal experience is not only of great benefit to my mediation practice, but is most effectively utilized in caucus.

Here are ten reasons why I espouse a mediation model where the use of caucuses is an integral, often early, and sometimes exclusive, feature of the mediation process.

1 Some People Just Don't Like One Another.

If the parties, or occasionally the lawyers, can't stand to be in the same room with one another, forcing them together may provide interesting entertainment, but it is less than helpful. Not all cases require that the parties reestablish a relationship. A given case may be capable of resolution even though the parties continue to despise each other to their dying breaths. The process of mediation is designed to resolve disputes. If tangentially relationships

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can be improved or if a long-term solution requires a positive relationship, fine. Just don't force it where it isn't needed and isn't likely.

2 Litigators Want to Advocate.

When confronted with the opposing party and lawyer, litigators can seldom resist the temptation to advocate. Joint sessions encourage the lawyer to assume the dominant role and "try" the case to the mediator and the opposing party. Opening statements in mediation are not always helpful for the same reason. In a caucus, on the other hand, there is less need to trumpet the merits of a case and a greater willingness to acknowledge weaknesses in position. Clients can be more directly engaged in a discussion of their interests when they and their counsel are given the assurance that anything said can remain confidential.

3 Negotiators Hold Their Cards Close.

A good negotiator doesn't rush in and open her hand for all to see. She reveals a card here and a card there, showing only what is necessary to close a deal. In joint sessions caution reigns. In caucuses, where the atmosphere is more casual and the discussion more candid, positions are revealed sooner. The best opportunity to find out where a party's interests lie is in an early caucus, where a slip of the tongue can do no lasting harm.

"In joint sessions, caution reigns."

4 Joint Sessions Can Magnify An Imbalance of Power.

An injured party and an insurance adjuster are not necessarily equal bargaining adversaries. Neither are a disciplined employee and her boss or a businessman and his wife who has little understanding of corporate finance. All lawyers are not equally competent or assertive. While the mediator has no duty to level the playing field, he is obligated to reduce opportunities for the assertion of a power advantage. Joint sessions give greater opportunity for the dominant bargaining power to assert itself.

5 Case Analysis Is Best Conducted in Private.

A good mediator must thoroughly analyze the case in preparation for the session. The more complex the case, the more important this becomes. The analysis becomes an indispensable tool for prodding and challenging the parties and for locating creative solutions. (It is not, however, the basis upon which to force a solution or predict a result.) In order to convince a party to change an understanding of the case or its value, the mediator must at the very least be seen as someone who understands the issues and who can bring a valued independent view to the table. In order to help a party work through her best and worst case scenarios, a mediator must have a credible understanding of the way in which issues will be resolved in court and a creative sense of how additional and, hopefully, better options can be explored in settlement. Because interests will likely vary between the parties, the best case for one side is not always the worst for the other, and vice versa. The case analysis discussed with one party can be different than the analysis suggested to the opposition. Since you want maximum candor, working through the options is usually best done in the caucus.

6 An Advocate for the Devil Must Be Subtle.

A mediator can play a valuable role in pushing a party to see problems or weaknesses in her position. Those areas of concern are not always ones which have yet been recognized by the opposing party. Since the mediator cannot "lawyer" for a party, it would not be appropriate to tell a defendant, for example, that he may have missed the statute of frauds as a defense. However, it can be suggested to the plaintiff that the defendant might some day wake up to the statute of frauds, causing a dramatic impact on the value of the case. This discussion can take place only in a caucus.

7 Real Interests May Never Come Forward in Joint Session.

Some things are just too sensitive to ever be revealed in joint session. If the contingent liability a company carries on its books for the case is creating problems with current financing arrangements or is complicating merger discussions, those facts will never be revealed to the opposing side. They may be revealed confidentially to the mediator. The caucus is an effective place to dig into hidden interests and to pick up nuances of expression and demeanor. The biggest revelations in a case are often inadvertently or indirectly disclosed.

8 Costs of Litigation Are Often Best Explored in Private.

Clients rarely have an understanding of what litigation costs. In the Western District, counsel and clients are asked to complete questionnaires

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after a mediation. Among the questions is one which asks for an estimate of how much was saved in attorneys' fees by settlement. Even after mediation, counsel's estimate of savings is often substantially higher than the client's. Because of differences in billing rates and approaches to staffing, the issues of cost are usually best discussed in a setting where the other side is not present. Costs for one side may be quite different than for the other and, while one side need not know if its cost structure gives it an advantage or disadvantage, each side must have a reasonable understanding of what its own exposure will be.

9 The Mediator Is An Instrument of Persuasion.

A mediator is more than just an umpire. Sometimes she has to encourage the batter to swing. Other times she has to coach. Persuasion is often needed to convince a party that his own interests lie in the direction of a settlement. A valuable feature of the caucus is the opportunity to form a relationship of trust between party and mediator. In a joint session the mediator can be on no party's side; in caucuses he may be sympathetic to both sides. Once the trust is established, the suggestions of the mediator are more readily accepted. By being able to explain positions and concerns to a mediator and to receive a sympathetic hearing, many parties feel that they have had their "day in court" and become willing to move to the resolution.

10 *Help a Party Face Reality*

Parties do not always have a realistic understanding of their case or its probable outcome. Sometimes counsel do not. Sometimes counsel have client control problems. An effective, albeit often last-ditch, approach may require that the mediator tell somebody just how short- sighted he is. If one party is seen as unrealistic, a settlement will be achieved only if the other is willing to pay for the distorted view or if a sense of realism can be imparted. Since capitulation rarely happens, it is usually left to the mediator to try to soften some skulls. This can only take place in private.

No two mediations are precisely alike. I always tell the participants at the outset that the mediation will be a work in progress, that there is no one right way, that we will stay flexible and try whatever may work in the situations that develop, and that I would like their active participation and assistance in the process itself by making suggestions and by expressing concerns. While early joint sessions followed later by caucus may work, I have found that early use of the caucus, followed by joint sessions after the points of disagreement have been narrowed, can be very effective.

One size will never fit all. Our goal is a settlement, not a process. A pragmatic and flexible approach, which allows the caucus to play a significant and early role in the appropriate case, holds much more promise than any formula. To teach otherwise is to lessen the effectiveness of a great tool for the resolution of disputes.

[1] **SCAO Interim Mediation Training Standards and Procedures, Section 2.1.8(a), footnote 2.**

Jon R. Muth is a member of the law firm of Miller, Johnson, Snell & Cummiskey, PLC in Grand Rapids, where he is a litigator and mediator. A former state bar president, Mr. Muth is a mediator with the Federal Court, Western District's voluntary facilitative mediation program, a frequent speaker on trial advocacy and a member of the Section.

Section Members Serve on Boards of CDRP's Around the State

Congratulations to the ADR Section members who currently serve on the boards of Community Dispute Resolution Program centers, including:

Oakland Mediation Center, Bloomfield Hills: Martin Reisig, president; William Brodhead, treasurer; Karen Agacinski, board member.

Dispute Resolution Center of Central Michigan, Lansing: Steve Lett, president; John Brennan, treasurer; John Kane, former president; Paula Manis, Cathy Jacobs, Kelly Reed, board members.

Dispute Resolution Center of West Michigan, Grand Rapids: Bob Wright, president-elect; Dale Ann Iverson, board member.

Federal Courts Examine Enforceability of Mandatory Employee Arbitration Agreements

— *by Mary Bedikian*

Mary Bedikian, past ADR Section chair and former vice president for the Detroit region of the American Arbitration Association, is now program director and professor at Michigan State University-DCL College of Law.

The law with respect to enforcing mandatory arbitration agreements continues to evolve. On September 11, 2003, the Fifth Circuit court of Appeals held that an arbitration provision in an employment contract is enforceable despite severance of an illegal provision that excluded punitive and exemplary damages from the kinds of damages that an arbitrator can award. Hadnot v. Bay Ltd., No. 03-40325 (5th Circ. 2003). In holding the arbitration agreement otherwise enforceable, the Fifth Circuit found that the arbitration provision without the damages restriction was capable of achieving its goal. Both the Sixth Circuit and the Ninth Circuit also have spoken on this subject. In each instance, the appellate courts found the violating provisions sufficiently egregious not to warrant enforcement. For the benefit of the reader, the cases are summarized below.

McMullen v. Meijer, Inc.,
2003 Fed. App. 0274P (6th Cir. 2003)
Employment arbitration - pre-dispute mandatory arbitration agreement -
vindication of statutory rights

McMullen initiated suit against her former employer, Meijer Corporation, seeking a declaratory judgment that her Title VII claims were not subject to the mandatory pre-dispute agreement she signed when she began employment with Meijer. At the time of hire (1989), McMullen received an employee handbook that described Meijer's termination appeal procedure (TAP) and the company's policy of terminating employees only with "just cause." McMullen had signed a form acknowledging receipt of the handbook, and assenting to the company's policy. Nine years later, a dispute arose, and McMullen was given the option of a reduction in pay, or termination. She chose to be terminated, and grieved.

"Meijer's arbitration plan was flawed in that it granted one party—Meijer—unilateral control over the pool of potential arbitrators."

In her termination appeal proceeding, McMullen asserted that Meijer's discharge was motivated by intent to discriminate against her on the basis of gender. Meijer denied the appeal internally, and informed McMullen that if she disagreed with Meijer's decision, her only recourse was to seek arbitration. McMullen filed for arbitration, but one day prior to the scheduled date of the arbitration, she filed a declaratory judgment action in state court challenging the fairness of Meijer's arbitration process. Specifically, McMullen claimed that under the procedures established by Meijer, Meijer selected the pool of arbitral candidates. The case was removed to federal court on Meijer's assertion that federal question jurisdiction was present. The district court denied Meijer's motion to compel arbitration and for summary judgment, concluding that the procedures used by Meijer to select an arbitrator "did not comport with the requisite level of fairness for such mandatory-arbitration contracts to be binding." Subsequently, the district court reversed its earlier decision, after Meijer moved for reconsideration in light of the Sixth Circuit's intervening decision in **Haskins v. Prudential Insurance Company of America**, 230 F.3d 231 (6th Cir. 2000).[1]

On appeal, the Sixth Circuit Court of Appeals addressed two issues. The first was whether, by agreeing to submit her claim to arbitration after the dispute had occurred, McMullen waived her right to sue. The Sixth Circuit concluded that McMullen did not agree to waive any right to sue by signing this form. The form was merely an administrative requirement before arbitration could be initiated. The form was neither an arbitration agreement nor an enforceable agreement because it lacked contractual consideration.

Second, the Sixth Circuit addressed the question of whether its decision in ***Haskins*** prevented the Sixth Circuit from considering whether a pre-dispute arbitration allowed for effective vindication of statutory claims. As a general proposition, even though public policy favors arbitration, arbitration agreements will not be enforced if they affect an individual's substantive rights. (***Gilmer***, 500 U.S. at 28, 111 S.Ct. 1647). Looking at its own recent decision in **Morrison v. Circuit City Stores, Inc.**, 317 F.3d 646 (6th Cir. 2003), and Gilmer, the Sixth Circuit concluded that Meijer's arbitration plan was flawed in that it granted one party to the arbitration (Meijer) unilateral control over the pool of potential arbitrators. "This procedure prevents Meijer's TAP from being an effective substitute for a judicial forum because it inherently lacks neutrality." Thus, McMullen's Title VII claims were not subject to arbitration.

Ingle v. Circuit City Stores, Inc.,
2003 U.S. App. LEXIS 9157 (9th Cir. 2003)

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Ingle v. Circuit City Stores, Inc., 2003 U.S. App. LEXIS 9157 (9th Cir. 2003)
Employment arbitration - arbitrability - procedural and substantive unconscionability

In September 1996, Catherine Ingle applied to become an associate at Circuit City. As part of the application process, Ingle was required to sign an arbitration agreement to resolve all employment-related claims through arbitration.

In June 1999, Ingle filed suit against Circuit City, alleging claims of sexual harassment, sex discrimination, and disability discrimination under the California Fair Employment and Housing Act, and sexual discrimination and retaliation under Title VII of the Civil Rights Act of 1964. In July 1999, Circuit City moved to compel arbitration, which was denied by the district court on the ground that the arbitration agreement was unenforceable under **Duffield v. Robertson, Stephens & Co.**, 144 F.3d 1182 (9th Cir. 1998). The district court found that Circuit City's form application unlawfully conditioned Ingle's employment on her agreement to forego statutory rights and remedies contrary to California law.

On appeal, Circuit City asserted that **Duffield** and California contract law did not preclude enforcement of the arbitration agreement. In assessing whether an arbitration contract is enforceable, courts look to the doctrine of unconscionability, which requires analyzing both substance and procedure. The procedural inquiry includes reviewing "the manner in which the contract was negotiated and the circumstances of the parties at that time." Here, the Court of Appeals concluded that Circuit City's arbitration agreement was oppressive. Circuit City possessed "considerably more" bargaining power than its employees and job applicants, it drafted the terms of the contract with no opportunity for employees to bargain any of the terms, and the agreement was a prerequisite to employment. The fact that Circuit City offered applicants a period of time to consider the terms of the arbitration agreement was deemed insufficient to overcome the otherwise oppressive character of the agreement itself.

Next, the court examined the substantive terms of the agreement, and found seven deficiencies:

- Claims subject to arbitration lacked bilaterality;
- Statute of limitations would deprive employees of the continuing violation doctrine available in FEHA suits;
- Prohibition of class actions could have the effect of "allowing an unscrupulous wrongdoer to retain the benefits of its wrongful conduct;"
- Filing fee required of employee is generally prohibited where an employer is imposing mandatory arbitration as a condition of employment, and here, the employee was required to pay the $ 75.00 fee to Circuit City directly, and not to arbitration service agency;
- Cost-splitting is ipso facto unenforceable, but moreso here because, under the terms of the arbitration clause, an arbitrator could assess specific costs against an employee if Circuit City prevailed on its claim;
- Remedies provision proscribed available statutory remedies and is therefore substantively unconscionable; and,
- The right to terminate or alter the agreement rested solely with Circuit City; no such parallel power was vested in employees.[2]

Although courts generally have the discretion to sever an unconscionable provision, "in exercising this discretion, courts look to whether the central purpose of the contract is tainted with illegality or the illegality is collateral to [its] main purpose. Here, the Ninth Circuit found the unconscionable provisions "insidious," and refused to enforce the agreement altogether.

In drafting employment ADR plans, great care must be taken to ensure that the provisions are balanced, and due process-compliant.

Counseling point: In drafting employment ADR plans, great care must be taken to ensure that the provisions are balanced, and due process-compliant. The American Arbitration Association's website (www.adr.org) contains Employment Due Process Protocols which attorneys could refer to in drafting employment policies and agreements. Since courts view most restrictions as suspect, any restriction of rights otherwise available in court must be examined closely in light of the protocols.

[1]In Haskins, the Sixth Circuit Court of Appeals explicitly rejected the Ninth Circuit's position of inculcating a "knowing" standard into the analysis of whether an arbitration agreement should be enforced. Instead, the Sixth Circuit held that absent a showing of fraud, duress, mistake or some other ground upon which a contract may be voided, courts must enforce agreements to arbitrate (Author's emphasis).

[2] The Court stated, "Although the agreement requires Circuit City to provide exiguous notice to its employees of termination or any modification such notice is trivial when there is no meaningful opportunity to negotiate the terms of the agreement. 2003 U.S. App. LEXIS 9157, *; 2003 Daily Journal DAR 5097.

Ask the Neutral

This issue's Ask the Neutral column was answered by Deborah L. Berecz, Chair of the ADR Section and partner in the law firm of Berecz & Klawiter, PLC in St. Joseph.

If you have a question, send it via e-mail to the Editor, Anne ***Bachle Fifer at abfifer@i2k.com.*** *The question will be assigned to an ADR Section Council member familiar with the subject area.*

Dear Neutral,

How does an attorney effectively educate a family client about mediation? I would like to move up the point in time that mediation is implemented, but even clients whose cases seem to demand an alternative to litigation can be reticent about the option. Often they are hearing from family and friends to—pick your descriptor—"take the louse for every dime he has," "grind her like a bug on a windshield," or "take 'em to the cleaners."

Signed

Tired of fighting the Greek Chorus

Dear Tired,

A mediator with many years of experience once said, regarding mediation, "There is large-sized need but petite-sized demand." That's still true, but changing. More and more, consumers are demanding an efficient and dignified means of resolving disputes.

But there's still a large contingent of folks who are uninformed about the options. I believe an attorney has an ethical duty to explore with a client all avenues available to meet the client's need for solving a problem. Litigation is only one possibility and clients need to know that.

One technique I've found productive in getting the possibility on the client's radar screen early is creating ambassadors from my secretarial staff. They are the professionals fielding the initial inquiries and can often connect with clients early on to lay the groundwork for considering mediation. Make sure your staff knows what mediators do, perhaps even allowing them to observe a mediation session if consent is secured from the clients. Talk to your staff about the benefits mediation can accomplish, and roleplay telephone calls so they become adept at fielding questions. When something works well in a mediation session, share it with the staff so that they have specific examples of why mediation works. Make certain they know the limitations as well, and recognize that not all cases are good candidates for mediation.

I've seen a number of family matters go to mediation after one spouse initially called my office for a divorce consultation but, after receiving information from my assistant, instead scheduled a joint session with his or her spouse for a mediation session.

Movement in this field is measured glacially. Fortunately, it appears to be moving at a somewhat more rapid pace these days.

Comments From the Chair

— by Deborah L. Berecz

Deborah L. Berecz, ADR Section Chairperson

No grass growin' under the feet of this Section.

The ADR Section Council is making tracks. On October 3 the Council met with our strategic planning consultant to review plans and develop priorities for the year. It was a long but energizing day and we emerged with clear objectives and strategies. Structurally, "Action Teams" have been formed and each has an individual council member with whom "The Buck Stops" for accomplishing identified tasks. They are as follows:

1. Access . . . . . .Tony Braun
2. Effective Practices . . . . . .Mary Bedikian
3 Legislative . . . . . .David Baumhart
4. Newsletter . . . . . .Anne Bachle Fifer
5. SCAO Partnership . . . . . .Deborah Berecz
6. Section- to-Higher Education . .Joel Schavrien
7. Section-to-Government . . . . . .Craig Hupp
8. Section-to-Section . . . . . .Jon Kingsepp
9. Skills . . . . . .Dale Ann Iverson
10. Website/List serve . . . . . .Jim Vlasic
11. 2004 Annual Meeting . . . . . .Tony Braun

Each Action Team has specific goals to be accomplished and a team in place to take it from paper to reality. If you would like to receive a copy of the objectives for the Action Teams, please e-mail me at B&K@bereczandklawiter.com. If you want to be involved with a particular Action Team, please contact the person who "holds the buck." Prepared to be put to work because this Section won't see grass for a long time!

Upcoming Mediation Trainings

The following 40-hour mediation trainings have been approved by SCAO to fulfill the requirements of the mediation court rules, MCR 2.411 (general civil) or MCR 3.216 (domestic relations). Please note that participants must attend all of the dates listed for each training session in order to complete the 40-hour training. For more information, visit the SCAO web-site at www.courts.michigan.gov/scao/dispute/odr.htm.

General Civil

Troy: November 20-22, December 5-6, 2003
Ann Arbor: March 25-27, April 9-10, 2004
Grand Rapids: June 3-5, 18-19, 2004

Register online at www.icle.org/mediation, or call 1-877-229-4350.
Training sponsored by Institute for Continuing Legal Education

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Bloomfield Hills: January 27, 29, 31, February 3,5,7

Contact: Nanci Klein at 248-338-4280
Training sponsored by Dispute Resolution Center of Washtenaw County

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Ann Arbor: March 5-7, 12-14, 2004

Contact: Kaye Lang at 734-222-3745
Email: drc@mimediation.org
Training sponsored by Oakland Mediation Center

Domestic Relations

Plymouth: February 3-7, 2004

Register online at www.icle.org/mediation, or call 1-877-229-4350.
Training sponsored by Institute for Continuing Legal Education

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Ann Arbor: December 3-5 and 9-10, 2003
Ann Arbor: April, 2004
Ann Arbor: July, 2004

Domestic violence screening for mediators training:
Ann Arbor: December 11, 2003

Register online at www.learn2mediate.com, or call 1-800-535-1155
Trainings sponsored by Mediation Training and Consultation Institute

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Also, mark your calendar now for the next Advanced Negotiation and Dispute Resolution Institute (ANDRI), co-sponsored by the Institute of Continuing Legal Education and the ADR Section, to be held March 18, 2004, at the St. John's Conference Center in Plymouth.

The ADR Newsletter

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For comments, contributions or letters, please contact:

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Alternative Dispute Resolution Section

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- 4. Learn about mediation training programs being offered in the state.
- 5. Receive the optional Membership Certificate, suitable for display, at an additional cost of $8.

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☐ $20 ☐ $28 if membership certificate is requested